IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 05-35569

NATIONAL WILDLIFE FEDERATION, et al.,
Plaintiffs-Appellees,

and

STATE OF OREGON,
Intervenor-Plaintiff-Appellee,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,
Defendants-Appellants,

and

BPA CUSTOMER GROUP, et al.,
Defendants/Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

BPA CUSTOMER GROUP'S EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL

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2. Facts Showing Existence and Nature of Emergency.

On June 10, 2005, the U.S. District Court for the District of Oregon entered a mandatory preliminary injunction in this Administrative Procedures Act ("APA") and Endangered Species Act ("ESA") case, requiring the United States Army Corps of Engineers ("Corps") to (1) provide summer spill at Lower Granite, Little Goose and Lower Monumental Dams and provide increased spill at Ice Harbor Dam from June 20, 2005, through August 31, 2005, and (2) provide summer spill at McNary Dam from July 1, 2005, through August 31, 2005. June 10, 2005

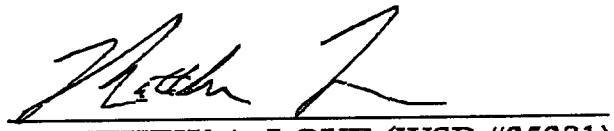
Injunction Opinion and Order (Exhibit A). An emergency stay of the injunction is critical, because otherwise any decision by this Court reviewing the efficacy of the injunction will be moot. Also, the harm caused by the injunction is immediate and irreparable. Once water is passed through a dam as spill instead of directed to turbines for the generation of power, it cannot be recovered, and consequently, the lost revenue from power generation cannot be regained. This is all the more problematic, because the injunction itself will harm the species that it is designed to benefit (the ESA listed Snake River Fall Chinook), the Northwest economy, and the BPA Customer Group. See Motion at 17-26. Accordingly, the Appellants ask this court to grant a stay as soon as possible, but no later than June 21, 2005. Pursuant to Federal Rule of Appellate Procedure 8(a), the Federal Defendants moved for a stay in the district court. The district court denied this motion. Clerk's Record (CR) 1014.

3. Notification and Service of Motion on Counsel.

On June 13, 2005, the BPA Customer Group filed the Notice of Appeal in the district court. On June 15, 2005, the BPA Customer Group filed this Rule 27-3 Motion and Motion for Leave to Exceed Page Limit and served the parties by overnight United Parcel Service and electronic mail, and the amici by regular mail and electronic mail. Counsel for all parties were notified of the filing of this

motion on June 15, 2005, by electronic mail, and counsel for the Plaintiffs-Appellees were also notified by telephone on June 14, 2005.

DATED this 15th day of June, 2005.



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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the parties known collectively as the "BPA Customer Group" state as follows:

Northwest Requirement Utilities ("NRU") represents consumer owned electric utilities located in California, Idaho, Montana, Nevada, Wyoming, Oregon and Washington. NRU has no parent corporation and has not issued shares to the public in the United States or abroad.

Pacific Northwest Generating Cooperative ("PNGC") is a non-profit generation and transmission cooperative. PNGC has no parent corporation and has not issued shares to the public in the United States or abroad.

Industrial Customers of Northwest Utilities ("ICNU") is an incorporated, non-profit trade association of large industrial electricity users in the Pacific Northwest, and has no parent corporation and has not issued shares to the public in the United States or abroad.

Alcoa Inc., is a producer of aluminum, with no parent corporation and no publicly held company which owns 10% or more of its stock.

International Association of Machinists and Aerospace Workers is a union, and has no parent corporation and has not issued shares to the public in the United States or abroad.

Public Power Council ("PPC") represents 114 regional consumer-owned utilities which fall into three categories: municipal utilities; public or people's utility districts; and rural electric cooperatives. PPC has no parent corporation and has not issued shares to the public in the United States or abroad.

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I. APPELLANT'S EMERGENCY MOTION TO STAY INJUNCTION PENDING APPEAL.

Pursuant to Fed. R. App. P. 8 and Circuit Rule 27-3, Appellants the Northwest Requirement Utilities, Pacific Northwest Generating Cooperative, Industrial Customers of Northwest Utilities, Alcoa Inc., International Association of Machinists and Aerospace Workers, and Public Power Council (collectively "BPA Customer Group") request that the Court of Appeals for the Ninth Circuit stay the U.S. District Court for the District of Oregon's June 10, 2005 Opinion and Injunction (Doc. No. 1015) ("June 10, 2005 Injunction"), in the above-captioned case pending the Appellants' appeal of the district court's order to the Court of Appeals for the Ninth Circuit.

The operation of the Federal Columbia River Power System ("FCRPS") is a complex matter that requires deliberate judgment and considerable agency expertise to carry out the mandates of various congressional directives. Since before the first Endangered Species Act ("ESA") listings in 1991, the Bonneville Power Administration ("BPA"), United States Army Corps of Engineers ("Corps") and the Bureau of Reclamation ("Reclamation") (collectively referred to as "Action Agencies"), in ongoing consultation with the National Oceanic and Atmospheric Administration ("NOAA"), have used this judgment and expertise to benefit the salmon and steelhead as well as comply with their statutory obligations, such as flood control, irrigation, navigation, recreation and to provide low cost

power for the region's economy.

In issuing the June 10, 2005 Injunction, mandating that the Corps increase summer spill at specific FCRPS projects, the district court took the extraordinary step of imposing an unproven approach to river operation that is based upon a faulty understanding of the governing law and biological impacts of its action. The June 10, 2005 Injunction not only fails to address the many expert agencies' professional opinions, but it also contains conclusory and unsubstantiated statements and inappropriately attempts to render scientific expertise that it does not possess. *See e.g. Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive"); *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 2381 (2004) (guiding principles behind the APA are "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.").

It further issued this mandatory injunction without making any adequate findings of fact or legal conclusions. Indeed, the record amply demonstrates that the June 10, 2005 Injunction is likely to be more harmful to ESA listed SRF

Chinook than continued implementation of the Updated Proposed Action ("UPA") spill regime. Additionally, the June 10, 2005 Injunction, with its $67 million dollar price tag, will cause needless irreparable harm to the Northwest economy and the BPA Customers. Finally, the June 10, 2005 Injunction is not in the public interest, because it requires the Action Agencies to abandon a working SRF Chinook operations strategy and will actually harm SRF Chinook.

II. LEGAL STANDARD FOR OBTAINING A STAY PENDING REVIEW.

A party seeking a stay pending appeal pursuant to Fed. R. App. P. 8 must show either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). These interrelated tests are applied on a sliding scale. *Westlands Water Dist. V. NRDC*, 43 F.3d 457, 459 (9th Cir. 1994). "The relative hardship to the parties" is the "critical element" in deciding at which point along the continuum a stay is justified." *Lopez*, 713 F.2d at 1435. If the public interest is involved, a court must determine whether the balance of public interests supports the issuance or denial of an injunction. *Caribbean Marine Servs. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

III. STANDARD OF REVIEW.

A district court's decision granting preliminary injunctive relief is reviewed

to determine if the court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See Harris v. Board of Supervisors, L.A. County*, 366 F.3d 754, 760 (9th Cir. 2004); *FTC v. Enforma Natural Products*, 362 F.3d 1204, 1211-12 (9th Cir. 2004); *Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir. 2004).

IV. BACKGROUND.

In the consolidated cases before the district court, National Wildlife Federation ("NWF") and other parties challenged the 2004 Biological Opinion ("2004 BiOp") and the Corps' and Reclamation's Records of Decision ("RODs") governing operations of the FCRPS. On May 26, 2005, the U.S. District Court for the District of Oregon issued an opinion (the "May 26, 2005 Opinion"), concluding that the 2004 BiOp for the FCRPS was "legally flawed" in four respects and entered a non-final order granting summary judgment to NWF. May 26, 2005 Opinion at 15, 44 (Exhibit B).

On June 10, 2005, the district court issued an injunction requiring 24-hour "spill" at three Snake River dams (excluding amounts necessary for producing sufficient electricity to operate the facility) and continuous spill at the fourth collector facility, McNary Dam, with respect to all flows in excess of 50,000 cubic feet per second (cfs). June 10, 2005 Injunction at 10. The district court determined that the Action Agencies acted arbitrarily and capriciously in relying upon the

2004 BiOp. June 10, 2005 Injunction at 7. The district court determined that such arbitrary and capricious reliance violated the procedural and substantive requirements of the ESA section 7(a)(2). The district court also stated that it found that "irreparable harm results to listed species as a result of the action agencies implementation of the updated proposed action." June 10, 2005 Injunction at 9.

V. ARGUMENT.

A. Appellants Are Likely To Succeed On The Merits.

1. The District Court Exceeded Its Authority In Issuing A Mandatory Injunction.

The district court took the unprecedented step of imposing an unproven approach to river operation that is based upon a faulty understanding of the governing law and biological impacts of its action. The June 10, 2005 Injunction requires the Corps to modify the spill regime set out in the 2004 BiOp at the four "collector" dams and, as a practical matter, to require increased in-stream passage rather than barge transportation. This relief falls outside the scope of a traditional prohibitory injunction and enters the realm of a mandatory injunction by altering, not maintaining, the status quo. *See, e.g., Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) ("A prohibitory injunction preserves the status quo. . . . A mandatory injunction 'goes well beyond simply maintaining the status quo *pendente lite* [and] is particularly disfavored'") (citation omitted). This type of extraordinary mandatory relief materially departs from controlling injunction

standards and distinguishes this controversy from other cases under the ESA, where only prohibitory injunctions were issued following disposition of the merits. *See Greenpeace v. National Marine Fisheries Service,* 106 F. Supp. 2d 1066 (W.D. Wash. 2000) (enjoining pollock fishery); *Natural Res. Def. Council, Inc. v. Evans*, 279 F. Supp. 2d 1129 (N.D. Cal. 2003) (prohibiting use of sonar in coastal areas absent compliance with certain conditions); *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1137-30 (D. Hawaii 2000) (enjoining operation of lobster fishery); *National Wildlife Federation v. National Marine Fisheries Service*, 235 F. Supp. 2d 1143 (W.D. Wash. 2002) (enjoining dredging).

By directing how the agency must act this summer, the district court effectively usurps the function of the executive agencies, and it does so without an appreciation of attendant circumstances or any particular expertise. Courts undoubtedly have broad discretion when fashioning relief under the APA. Yet, it should be the rare case, and only after at minimum a detailed review, when a court should direct specific relief, such as has been done here. This is because any such relief, rendered in the isolated chambers of a district court that must simply respond to the parties and issues before it, cannot account for the many issues that confront executive agencies when they act.[1]

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[1] This is best illustrated by a circumstance where a court ordered mandatory injunction to comply with what the court believes is appropriate under the ESA might violate some other prescription, such as under the Clean Water Act. The

This Court recognizes such limitations. Citing to *Miguel v. McCarl*, 291 U.S. 442 (1934), this Court has held that "[w]hen the effect of a mandatory injunction is equivalent to the issuance of mandamus, it is governed by similar considerations." *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986). Looking to the standards developed under the mandamus statute, 28 U.S.C. § 1361, this Court stated:

> Mandamus relief is only available to compel an officer of the United States to perform a duty if (1) the plaintiff's claim is clear and certain; (2) the duty of the officer is 'ministerial and so plainly prescribed as to be free from doubt[;]' . . . and (3) no other adequate remedy is available."

Id. (citations omitted). *Fallini* was followed by *Oregon Natural Resource Council v. Harrell*, 52 F.3d 1499 (9th Cir. 1995), where this Court observed that "[w]hile recognizing that ONRC made a compelling case for doing something about the partially-completed dam to save the fisheries, the district court believed it was appropriate to give the agencies with expertise an opportunity to respond to the new information on remand before ordering the mandatory relief ONRC sought." *Harrell* at 1508.

Harrell thus counsels deferral to the appropriate agency process for responding to how best to remedy perceived errors in an agency's action,

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point here is not whether this will occur, but rather that a district court is not capable of even addressing such issues that are not part of the proceeding.

particularly where circumstances are constantly changing and there is a need for adaptive management. *See* AR A.1 at 10-7 ("NOAA Fisheries understands that the proposed hydro action employs an adaptive management framework for adjusting the proposed action to respond to new information"); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002).

Here, mandatory relief would not be appropriate under the standards for issuing mandamus, because there clearly is no outstanding ministerial obligation on the part of the agencies to undertake the spill program. The summer spill program is not contained in the law or even in any outstanding biological opinion. No dispute exists that the Corps, absent an injunction, will not spill at the four "collector" dams—Lower Granite, Little Goose, Lower Monumental and McNary—during the June 21-August 31 period. AR C.289 (UPA) at 50 (Table 4). Summer spill regimes embody an assessment of the relative efficacy of juvenile in-stream migration and transportation given historical flow conditions. The UPA reflects the considered exercise of discretion by the three agencies with respect to how they would discharge general statutory responsibilities.

The district court further abused its discretion by failing to tailor such extraordinary relief to the alleged harm. *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991); *Lewis v. Casey*, 518 U.S. 343, 359 (1996) ("[t]he scope of injunctive relief is dictated by the extent of the violation

established."); *accord Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001) (in the context of "system wide relief" against state prison officials, the Ninth Circuit accordingly has adhered to "the longstanding maxim that injunctive relief against a state agency or official must be no broader than necessary to remedy the . . . violation."). The same limitation exists with respect to injunctive relief against federal officials or agencies. *See, e.g., Meinhold v. USDOD*, 34 F.3d 1469, 1480 (9th Cir. 1994) ("[a]n injunction 'should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs'"). The district court here never attempted to demonstrate how its relief addressed any likely violation of the ESA by the Corps.

2. The Court Failed To Adequately Identify A Violation Of The ESA By The Corps Which Would Justify Injunctive Relief.

Next, the district court erred in failing to identify with any specificity the alleged violations against the Action Agencies. The June 10, 2005 Injunction is based on the district court's earlier May 26, 2005 opinion.[2] Yet, that opinion only held that NOAA violated the APA by issuing a biological opinion that "constituted a substantial procedural violation of NOAA's consultation duty pursuant to section

[2] As explained in the Federal Defendants' June 15, 2005 Emergency Motion For Stay of the June 10, 2005 Injunction, the Defendants are likely to prevail on the merits of the 2004 BiOp validity because the district court erred as a matter of law in concluding that the 2004 BiOp was legally flawed. *See* Fed. Def. June 15, 2005 Emergency Motion.

7 of the ESA." June 10, 2005 Injunction at 3.[3] From there, the district court then concludes, in its June 10, 2005 Injunction, that the action agencies "failed to comply with the procedural and substantive requirements under section 7(a)(2) of the ESA." *Id.*[4]

The district court never clearly articulates what particular "procedural" and "substantive" requirements it found violated. This is particularly problematic because of the separate challenges to NOAA's action and that of the Action Agencies. The June 10, 2005 Injunction fails to address adequately—indeed, virtually ignores—the nature of this proceeding and the difference between the challenge to NOAA's biological opinion and the challenge to the RODs by the Action Agencies. Instead, when issuing the preliminary injunction, the district court simply collapses straightforward jurisdictional principles and issues an injunction against the Action Agencies with virtually no legal or factual analysis.

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[3] Indeed, in issuing the June 10, 2005 Injunction, the district court is not precise in describing its own decision. Although the court expressly limited its May 26, 2005 Opinion to finding four identified legal errors that could warrant an adverse judgment under the APA, its remedial order now states that it found that the "2004 BiOp does not comply with the ESA's mandate to protect listed species" June 10, 2005 Injunction at 5, and that the "BiOp violates the ESA." *Id.* at 6. At best, and assuming arguendo the efficacy of the May 26, 2005 Opinion, the district court as a jurisdictional matter only concluded that the BiOp violated the APA because the analysis contained in it was contrary to the district court's interpretation of ESA.

[4] The district court specifically excluded from its consideration whether there would likely be "take" of the species pursuant to section 9 of the ESA. June 10, 2005 Injunction at 3-4.

It does this by first concluding, in the May 26, 2005 Opinion, that NOAA's action of issuing the BiOp violates the APA, and then by fiat in the June 10, 2005 Injunction that the Action Agencies also violated the APA and presumably the citizen suit provision of the ESA.[5]

In fact, the district court provides almost no justification for why the Action Agencies independently violated the APA or the ESA. It is inconceivable what procedural requirement the district court believes the Action Agencies violated; the Action Agencies unquestionably fulfilled their section 7(a)(2) procedural obligation under the ESA to consult with the relevant Service agency. And the district court never identifies any procedural violation.[6]

The principal question, then, is whether the Action Agencies acted arbitrarily or capriciously in issuing their RODs, or otherwise violated the substantive component of section 7(a)(2)—that is, ensuring that their action was not likely to jeopardize the continued existence of a listed species or result in the adverse modification or destruction of critical habitat. To begin with, the district court merely concludes that the Action Agencies acted arbitrarily in relying upon

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[5] The district court has not yet rendered a judgment on the RODs themselves, but instead indicates that it intends to "order the action agencies to withdraw their RODs implementing the proposed action. . ." June 10, 2005 Injunction at 9.

[6] To the extent the district court implicitly assumed that an ESA section 7(a)(2) procedural violations occurs whenever a biological opinion is found to be invalid under the APA, such reasoning would be contrary to the Supreme Court's opinion in *Bennett v. Spear*, 520 U.S. 154 (1997).

the BiOp, because the district court found the BiOp to be flawed. June 10, 2005 Injunction at 7. But here the district court's own analysis belies its conclusion. The district court notes that the "[t]his court has previously found that an action agency cannot rely on a 'facially arbitrary no-jeopardy determination' where extensive record evidence indicates an action will harm threatened species." *Id.* (*citing Northwest Environmental Advocates v. EPA*, 268 F. Supp.2d 1255, 1274 (D. Or. 2003)). This is too simplistic and cannot possibly stand as the test for whether an Action Agency may rely upon a biological opinion, as "harm" will naturally occur in almost every biological opinion—jeopardy or no-jeopardy—as formal consultation is not even triggered if the action is not likely to adversely affect the species. "Harm" to the species is not the same as "likely to jeopardize" the species.

Next, the district court merely concluded, with no analysis, that the Action Agencies did not independently assess whether their action would violate the substantive prescription against jeopardy under section 7(a)(2).[7] The district

[7] Action Agencies have an independent obligation under the ESA to avoid jeopardy, and in complying with this obligation they are not necessarily bound by the Reasonable and Prudent Alternatives ("RPAs") in a biological opinion. *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988). Here, the district court's order only suggests the Action Agencies failed to provide an independent rational basis for its section 7(a)(2) judgment (June 10, 2005 Injunction at 6-7), which at best would reflect a judgment by the court that the Action Agencies acted arbitrarily and capriciously, and not that they necessarily violated the ESA, as the court further concludes.

court's five paragraphs offer no detailed findings of fact, no references to declarations or the record, and effectively deprive this Court of any meaningful guidance for determining whether the district court abused its discretion or relied on clearly erroneous findings of fact.

3. The District Court Relied Upon Clearly Erroneous Findings Of Fact And Did Not Support Its Legal Conclusions With Adequate Findings.

Third, a district court abuses its discretion in granting a preliminary injunction when it either rests its conclusions on clearly erroneous findings of fact, *Sports Form, Inc. v. United Press Intern., Inc.*, 686 F.2d 750 (9th Cir. 1982) or fails to support its decision by findings of fact. *See Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1230 (9th Cir. 2001). The court here did both.

At the outset, the June 10, 2005 Injunction contains a clearly erroneous finding of fact regarding the perceived difference between 2000 Biological Opinion ("2000 BiOp") spill regime and 2004 UPA spill regime.

The district court states:

> the RPA for the 2000 BiOp targeted spill during summer months at a level minimally necessary to allow for a meaningful in-river migration program against which the summer transportation program would be compared. However, [the 2004 UPA] allows for no voluntary spill at four lower Snake River and Columbia Dams (Lower Granite, Little Goose, Lower Monumental, and McNary) during the summer transport period. This restriction would not preserve even a semblance of the spread-the-risk considerations NOAA contends govern the spring migration program.

June 10, 2005 Injunction at 9. In this statement, the district court incorrectly

assumes that: (1) the 2004 UPA's spill regime for Lower Granite, Little Goose, Lower Monumental and McNary dams is different from the spill regime required by the 2000 BiOp Reasonable and Prudent Alternative (RPA); and (2) the 2004 UPA's spill regime is a retreat from the 2000 BiOp's spill regime.

Yet, the 2004 UPA and 2000 BiOp spill regimes are identical. Under the UPA, there is no summer spill at Lower Granite, Little Goose, and Lower Monumental Dams on the lower Snake River and McNary Dam on the Columbia River. *See* UPA at 50 (Table 4) (Exhibit C). Likewise, the 2000 BiOp's RPA Action 54 describes the annual spill program that the Corps was required to execute each year. *See* 2000 BiOp at 9-88 through 9-92 (Exhibit D). Specifically, with regard to summer operations at collector dams, footnote no. 1 of table 9.6-3 states, "Summer spill is curtailed on or about June 20 at the four transport projects (Lower Granite, Little Goose, Lower Monumental and McNary dams) due to concerns about low inriver survival rates." 2000 BiOp at 9-89.

This erroneous factual finding appears to be the sole justification for the June 10, 2005 Injunction. In making this error, the district court misapprehended the "spread the risk" strategy underlying the discussion of the spill regime. NOAA's "spread the risk" strategy provides the justification for the 2000 and 2004

spill regimes.[8] A cornerstone principle of the "spread the risk" strategy is the recognition that when river conditions are hostile to juveniles, risk management dictates increased transport. In low flow conditions, such as those expected in 2005, the available data indicates that transportation of juveniles is likely to result in a much higher survival rate than in-river migration. *See* Ocker Decl. ¶ 31. The June 10, 2005 Injunction, however, would result in an abandonment of this cornerstone principle of "spread the risk" strategy by increasing the number of juvenile SRF Chinook that must migrate in-river, notwithstanding the hostile in-river conditions. Ocker Decl. ¶¶ 34-37.

As such, the district court abused its discretion by justifying its June 10, 2005 Injunction upon a clearly erroneous finding of fact regarding the perceived difference between the 2000 BiOp and the 2004 UPA.[9] As described below, this error will likely lead to increased harm to SRF Chinook during 2005.

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[8] NOAA relies upon the "spread the risk" strategy in developing juvenile migration strategies. This common sense strategy provides that when the science is unclear as to which management scenario would most benefit either a population or sub-population of anadromous fish, the best management option may be to perform two or more viable management options in an attempt to maintain stock viability and genetic diversity. *See, e.g.*, Ocker Decl. ¶ 19 (Exhibit E). NOAA has applied the term "spread the risk" to the management options of transporting migrating juvenile salmonids around the FCRPS or allowing them to migrate in-river. AR B.157 (2000 BiOp).

[9] Although it is not apparent from the district court's opinion, it is possible to speculate that the Court possibly may have been referring to an in-river versus transport study required by the 2000 BiOp (RPA Action 46). As explained by the

And aside from this erroneous finding, the district court failed to make any further requisite findings that would support an injunction. In contrast to *Greenpeace v. National Marine Fisheries Service*, 80 F.Supp. 2d 1066 (W.D. Wash. 2000) and other ESA cases, where the courts issued injunctive relief after carefully analyzing the evidence presented and made detailed factual findings, the June 10, 2005 Injunction omits any real findings of fact. *Eg. National Wildlife Federation v. National Marine Fisheries Service*, 235 F. Supp. 2d 1143 (W.D. Wash. 2002).

Instead, the district court, in only two cursory pages of discussion, renders a conclusory judgment about "harm" to migrating juvenile salmon and steelhead, but fails to make any specific findings or identify the factual basis regarding exactly what is the irreparable harm to SRF Chinook (the only ESA listed species materially impacted) caused by agency action under review. The court simply proffers that "operation of the DAMS [sic] causes a substantial level of morality to migrating juvenile salmon and steelhead." June 10, 2005 Injunction at 8. While this may or may not be true depending upon the specific ESA listed species, it does not provide a justification for a finding of irreparable harm to SRF Chinook.

Likewise, the district court fails to make meaningful findings of fact regarding the scope or impact of the injunctive relief. The district court does not

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Federal Defendants in their motion for stay, this study is still required by the 2004 BiOp and will be implemented under the 2004 UPA.

determine whether the injunction will prevent the perceived irreparable harm to listed species. The court failed to make any findings that the alleged benefits from the June 10, 2005 Injunction would outweigh the increased harm that SRF Chinook will face from the injunction. This is a clear abuse of discretion.

B. Absent A Stay Of The June 10, 2005 Injunction, The Injunction Will Cause Irreparable Harm.

Absent a stay of the June 10, 2005 Injunction, this Court will not be able to render a meaningful decision on whether the district court acted appropriately in issuing the mandatory injunction, and the United States and BPA Customer Group will face the threat of unrecoverable economic loss.

1. Lack of Meaningful Judicial Review.

Absent a stay, meaningful judicial review cannot occur. The extraordinary relief ordered by the district court requires compliance by the Action Agencies starting on June 22, 2005. This is when the Action Agencies must begin the spill program under the district court's mandatory injunction, even though such a program was not even a part of the 2000 BiOp's RPA. This mandatory injunction will expire by the end of this summer, well before this Court has had an opportunity to review the merits of the June 10, 2005 Injunction. As a consequence, the Action Agencies are placed in the untenable position of having to comply with an order that this Court may ultimately determine was inappropriate. By the time of any decision by this Court, however, the matter will be moot and

the decision will be advisory only.[10] A stay is necessary, therefore, to ensure the availability of meaningful judicial review.

2. Absent A Stay Of The June 10, 2005 Injunction, The BPA Customer Group's Members Will Likely Experience Irreparable Harm.

The United States and the BPA Customer Group will incur unrecoverable economic harm. The threat of unrecoverable economic loss qualifies as irreparable harm and can support preserving the *status quo*. *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 423 (8th Cir. 1996).[11] Additionally, economic loss may constitute irreparable harm where the loss threatens the very existence of the movant's business. *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 673-74 (D.C. Cir. 1985).

Such irreparable harm can be demonstrated by proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is

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[10] This scenario is further exacerbated by the district court's decision to wait until after this summer to render an appealable decision on the merits, as well as a decision on the appropriate permanent relief against both NOAA and the action agencies. Absent this next step by the district court, it would be inappropriate to suggest that this matter will not become moot because it is capable of repetition.

[11] Certainly "when environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Sierra Club* at 1195 (internal quote omitted and emphasis added). In this case, the district court failed make adequate finding that such injury is sufficiently likely to occur due to the continue implementation of the 2004 UPA spill regime. Indeed, as described below, the opposite appears to be true – the spill regime mandated by the Injunction will likely cause injury to SRF Chinook. Notwithstanding, because of the significance of the irreparable economic harm from the injunction and the questionable nature of the harm sought to be avoided, this presumption should not apply. Additionally, regardless of this presumption, the district court needed to balance the perceived environmental injury against the irreparable economic harm, yet failed to do so.

certain to occur in the near future. *Id.*

The June 10, 2005 Injunction will likely cause significant and irreparable harm to the Northwest economy. Once water is passed through a dam as spill instead of directed to turbines for the generation of power, it cannot be recovered, and consequently, the lost revenue from power generation cannot be regained.

BPA is commonly referred to as the economic engine of the Pacific Northwest, particularly for Washington and Oregon. With an overall regional population of approximately 11.5 million, BPA provides about 40% of the electric power used in the Northwest. Carr Decl. ¶ 5 (June 14, 2005) (Exhibit F). In the past, BPA's power rates have been attractive, compared to the market price of power. *Id.* at ¶ 8. The economy in the Pacific Northwest has developed around low cost power, but recently, as a result of a number of factors, BPA's power rates have taken a dramatic turn upward.[12] *Id.*

The June 10, 2005 Injunction will likely have an overall net financial impact of $67 million. *Id.* at ¶ 18. Of that amount, 78% would need to be recovered from

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[12] In FY 2002, BPA's power rates spiked to over 3 cents per kWh due to BPA's need to acquire power in a high-priced market to serve returning load, in addition to providing significantly more financial benefits to investor-owned utilities. Carr Decl. at P. 13. This price jump had a damaging impact on the Northwest economy. *Id.* The Northwest Power and Conservation Council issued a February 25, 2005 study regarding BPA rates that describes what happened to the Northwest economy between 2000 and 2003. *Id.* Their study showed a loss of 72,000 jobs, and Oregon and Washington had the highest unemployment rate in the nation, next to Alaska. *Id.* All of the region's ten aluminum smelters shut down, and only three have subsequently partially re-opened. *Id.*

rates (with the balance representing foregone revenues to BPA customers that purchase a percentage of the system generation output). *Id.* at ¶ 18-19. This would result in $52 million in immediate BPA rate impacts. *Id.*

According to BPA analysis, the June 10, 2005 Injunction would translate into an immediate rate increase of 3.9 %. *Id.* at ¶ 20. BPA's current wholesale power rates at 3.0 cents kWh are too high for the region and continue to impede economic recovery. The economic consequences of the increased rates due to the June 10, 2005 Injunction would likely be substantial. These regional consequences include a loss of 513 jobs to the region, and a loss of personal income of $54 million. *Id.* at ¶ 26. These economic losses are irreparable, as they are unrecoverable. Likewise, these losses also are irreparable, because they will threaten the actual livelihood of hundreds of individuals and businesses throughout the Northwest.[13]

Remarkably, the district court neither accounts for these adverse economic impacts nor explains why these adverse economic impacts to the region are justified in light of the alleged benefits, which the district court believes will be

[13] *See* Carr Decl. (Exhibit G), McMahon Decl. (Exhibit H), Rousseau Decl. (Exhibit I), Yarborough Decl. (Exhibit J), Wollenberg Decl. (Exhibit K), Collins Decl. (Exhibit L), Croeni Decl. (Exhibit M), Strebin Decl. (Exhibit N), McGregor Decl. (Exhibit O), Tracy Decl. (Exhibit P); and Klicker Decl. (Exhibit Q) for examples which illustrate the types of adverse economic impacts that the order would have on BPA customers.

achieved through implementation of the June 10, 2005 Injunction. Consequently, this threat of unrecoverable economic loss constitutes irreparable harm and further justifies staying the June 10, 2005 Injunction.

C. The June 10, 2005 Injunction Is More Likely Than Not to Be More Harmful To SRF Chinook Than Continued Implementation of the 2004 Biological Opinion and Clearly is Not in the Public Interest.

The June 10, 2005 Injunction is not in the public interest because it requires the Action Agencies to abandon a working SRF Chinook operations strategy. The recent abundance trends clearly point toward a stable or rebuilding population. *See* Chapman Dec. at ¶¶ 5-10. The SRF Chinook population has rebounded dramatically in recent years under the current summer transportation regime (which is consistent with the 2000 BiOp, the 2004 BiOp and the 2004 UPA).

Since NOAA listed SRF Chinook, the escapement of adults of both hatchery and natural origin has increased by over 12-fold. Chapman Decl. at ¶¶ 5-10. At Lower Granite Dam, total counts of returning adult SRF Chinook (hatchery and natural-origin) have exceeded 14,000 in the most recent two years. *Id.* Adults of natural-origin are estimated to number approximately 4,000, roughly a third of the total fish count. *Id.* Over the past five years, adult returns of natural origin on average have exceeded NOAA's interim recovery target.[14]

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[14] Escapements arguably could have increased even more if the substantial commercial and recreational harvest of SNF Chinook had been reduced or terminated. Chapman Decl. ¶ 6 (Exhibit R). For the last several years, the

The population rebound has not appeared by chance. Since the SRF Chinook ESA listing in 1990, several factors contributed to the increase in population numbers for SRF Chinook. Hydrosystem operations that relaxed migration bottlenecks and improved survival of SRF Chinook during all life stages spent in the areas affected by FCRPS facilities have interacted favorably with improved ocean conditions. *Id.* at ¶ 9.

Moreover, the June 10, 2005 Injunction is likely to be more harmful to SRF Chinook. In response to Plaintiffs' Preliminary Injunction Motion, NOAA independently analyzed the potential impacts of Plaintiffs' requested relief. NOAA determined that Plaintiffs' requested relief would likely have greater adverse impacts on out-migrating juvenile SRF Chinook than continued implementation of the UPA. *See* Toole Decl. (Exhibit S) at ¶ 18 ("the relative difference in system survival under the plaintiffs' injunctive relief proposal is 26-48% lower than the system survival under the UPA operation.").[15] Additionally,

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Columbia River mainstem fisheries have been managed with a combined 31% harvest rate limit for SRF Chinook for treaty and non-treaty fisheries. *Id.* at ¶ 10. The actual harvest rate has ranged between 21% and 31% over the last five years. Ocean harvest is approximately 15%. *Id.* Heavy harvest, in both freshwater and the ocean during and following periods of extremely poor ocean survival conditions, has been cited in research and noted in the 2004 BiOp's administrative record as a contributor to the decline in spawning escapement of naturally produced Columbia and Snake River salmonids during the 1980s and 1990s. *Id.*

[15] This estimate was based upon a NOAA SIMPAS analysis which was conducted based solely upon the effects of the spill regime that the district court adopted in its June 10, 2005 Injunction. *See* Toole Decl. ¶ 17.

the Federal Defendants presented numerous expert opinions, explaining the likely adverse impacts from adopting the proposed summer spill regime. In issuing its ruling, the district court failed to defer to these expert opinions and, instead, inappropriately ignored these expert opinions. *See Mt. Graham Red Squirrel v. Espy*, 986 F2d 1568, 1571 (9th Cir. 1993) (Deference to a federal agency's expertise "is especially appropriate where . . . the challenged decision implicates substantial agency expertise.").

Even if the district court implicitly believed that its order increasing summer spill would reduce harm to listed species, such an implicit belief is not supported by any quantifiable data in the record.

Several factors must be considered to ensure safe spill passage of smolts at each of the FCRPS projects. Peters Decl. ¶ 12 (Exhibit T). These factors include in river conditions, level of spill, total dissolved gas (TDG), more project-specific information on approach conditions in the forebay, conveyance through the spillway, and hydraulic egress conditions through the tailrace. *Id.* Despite being presented with substantial evidence on these issues,[16] the district court failed to

[16] McKern Decl. at ¶¶ 12–14 (Total Dissolved Gas risks) (Exhibit U), ¶ 18 (in-river migration risks); Chapman Decl. at ¶¶ 22–29, 31 (in-river migration risks), ¶ 32 (increased predation risks), ¶ 40 (degraded river conditions risks), ¶ 43 (in-river migration risks), ¶ 44-46 (TDG Risks); Ocker Decl. at ¶ 23 (increased spill will negate the potential benefits of the "spread-the-risk" strategy of transporting Snake River fall chinook during periods of poor water quality), ¶ 29 (increased spill may decrease holding overs), ¶ 30 (concluding in-river migration may result in a higher

consider or address these issues in its June 10, 2005 Injunction.

Because river water temperature will likely exceed the Environmental Protection Agency's ("EPA") maximum water temperatures for most of this summer, in-river migration will be lethal to juvenile SRF Chinook. The June 10, 2005 Injunction will result in the dramatic reduction in the percentage of juvenile SRF Chinook transported and corresponding increase in the percentage of SRF Chinook juveniles which must migrate in-river. Despite significant evidence presented to the district court regarding this risks of subject these SRF Chinook to these hostile river conditions, the court failed to consider – or even acknowledge - these risks to SRF Chinook.

The EPA has determined that river temperatures greater than 18-20° Celsius (C) constitute high disease risk to SRF Chinook.[17] Chapman Decl. ¶ 24. The most recent hydrological estimates indicate that 2005 river conditions will likely

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mortality), ¶ 31; Peters Decl. at ¶ 6, ¶ 15, ¶ 19 (reduce transport), ¶¶ 21 - 22 (TDG levels will exceed safe levels), ¶ 28 (increased spill would preclude planned research at Snake River dams), ¶ 16 (increased spill has not been adequately evaluated), ¶¶ 18-23 (increased spill would preclude research on fish transportation and the Removable Spillway Weirs being tested at Snake River dams); Henriksen Decl. at ¶ 25 (Plaintiffs proposed spill operation will result in TDG exceeding legal criterion) (Exhibit V), ¶ 44 (TDG will exceed state variance levels); Ponganis Decl. at ¶¶ 69-71, ¶¶ 73-74 (Plaintiffs' summer spill request would be a detriment to ongoing salmon survival research) (Exhibit W); Lohn at ¶ 13 (describing "gas bubble trauma" that can result from high spill levels) (Exhibit X).

[17] High temperatures accelerate activity and prey consumption by predatory fish, increase likelihood of disease incidence, and raise energy consumption in juvenile salmon. Chapman Decl. ¶ 32. Migrants must consume higher daily rations or use stored energy to cope with increased physiological demands. *Id.*

resemble the river conditions in 2003. Toole Decl. at ¶ 13. Because 2005 resembles 2003, water temperatures likely will exceed this 18-20°C threshold for most of the summer. 2003 is generally characterized as a very low-flow, high-temperature year with poor in-river migration conditions for juvenile SRF Chinook. During that year, water temperatures remained above 20°C from the middle of July through the end of August. Chapman Decl. at ¶ 6. From early August through the end of the month, water temperatures were generally above 22°C and, periodically, over 24°C. *Id.* These temperatures can be lethal to salmon.

The June 10, 2005 Injunction would result in an abandonment of this cornerstone principle of "spread the risk" policy by increasing the number of juveniles that must migrate in-river. Ocker Decl. ¶¶ 34-37. To ignore the "spread the risk" policy and reduce transportation during a drought year is a high risk venture.

Finally, spilling a large proportion of the river at multiple sequential dams, as required by the June 10, 2005 Injunction, entrains atmospheric gases and could also result in potentially dangerous elevated levels of supersaturated gases in tailraces. Chapman Decl. ¶¶ 20-22; Peters Decl. ¶ 21. The EPA has established a water quality standard limit of 110% of saturation for river conditions in the Columbia River basin, although discrete permissible variations of up to 120% in

tailraces and 115% in forebays have been permitted where no harm to fish has been demonstrated. The district court ordered spill regime will likely cause exceedences of these TDG standards. To the extent that the June 10, 2005 Injunction would result in gas supersaturation levels in excess of these standards, the injunction will likely cause trauma to juvenile and adult SRF Chinook. Chapman Decl. ¶¶ 20-22.

VI. CONCLUSION.

For the reasons stated above, the June 10, 2005 Injunction should be stayed pending this Court's final disposition of this appeal.

DATED this 15th day of June, 2005.

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